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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of the Application of SBC Communications Inc. and Southwestern Bell Telephone Company and Southwestern Bell Communications Services, Inc. D/B/A Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Texas	))))))	**CC Docket No. 00-4**

COMMENTS OF
THE CONSUMER FEDERATION OF AMERICA

INTRODUCTION

The Consumer Federation of America (CFA) is the nation's largest consumer advocacy group. Founded in 1968, CFA is composed of over 250 state and local affiliates representing consumer, senior citizen, low-income, labor, farm, public power, and cooperative organizations. CFA's purpose is to represent consumer interests before the Congress and the federal agencies and to assist its state and local members in their activities in their local jurisdictions.

CFA has participated in every section 271 application that has been considered by the Federal Communications Commission (FCC). CFA has also participated in the collaborative state proceedings in several states.

OVERALL RECOMMENDATION: A LITTLE MORE WORK NEEDS TO BE DONE

In commenting on the Bell Atlantic New York section 271 application, CFA used a football analogy. Bell Atlantic had carried the ball down to the goal line and fumbled. One referee, the New York Public Service Commission, said that it had crossed the goal line. The second referee, the Department of Justice, said that it did not think that it had done so. However, it did recognize how, looking at the play from another angle, the other referee could reach a

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different conclusion. Ultimately, the Federal Communications Commissions concluded that it had crossed the goal.

We can use a similar analogy in the case of the SBC application in Texas, but the location on the playing field is different. The Texas Public Utility Commission says that SBC scored a touchdown. The Department of Justice says that they stepped out on the five yard line and another play is definitely necessary.

We believe that the SBC application is significantly different than the New York application. It requires a much clearer demonstration in advance of the ability of SBC to deliver parity to competitors for several reasons. At the same time, tremendous progress has been made in Texas. It is obvious that SBC and the Texas PUC have moved 95 yards and they should not have to go over that ground again. SBC should be required only to demonstrate compliance in specific areas in which the FCC finds deficiencies. This can be done on a fast track in a compliance proceeding.

WHY A COMPLIANCE PROCEEDING IS NECESSARY IN TEXAS

CFA advocated a compliance proceeding in New York. The Texas application poses a different problem for the Commission than New York and one which needs the compliance proceeding even more. Texas requires greater demonstration of actual performance for several reasons.

Institutional Differences: First, as made clear by the Department of Justice, the pre-application test does not carry the same weight as it did in New York. The test lacks basic elements of scientific validity.

Second, as made clear in the Comments of the Texas Office of Public Utility Counsel, the Performance Assurance Plan is not likely effectively discipline post-entry behavior.

Third, several aspects of Texas PUC actions have recently been constrained by legislation. The PUC is enjoined from requiring SBC to anything more burdensome than the FCC requirement. Once the FCC approves entry, SBC is certain to argue that the Texas PUC can ask for no more in these areas.

Performance Issues: There are several aspect of the performance of SBC in Texas that indicate a need for more data on its actual performance.

First, the Texas PUC comments indicate that SBC had not delivered parity on 26 of 131 performance measures in the final quarter of data prior to the application. While many of these were "close," they were still misses and the parity measures allow for a statistical margin of error. The measures were negotiated in the collaborative and we believe that companies should be in statistical compliance before entry. There is no point in spending immense effort to establish the performance measures and standards and then ignore them. If they are too demanding, then they should be renegotiated in a collaborative process. Post-entry, performance penalties are applied to induce continued parity not create it in the first place.

Second, the Department of Justice identifies a number of important measures that it deems to be not at parity and which have exhibited worsening performance as volumes have increased. Additional experience and data will give the Commission a better understanding of the these important issues.

Third, there are several aspects of the SBC's operations that have only recently been implemented, such as a new change management process. Additional experience and data will help the Commission ascertain how the systems will perform at full commercial scale.

Policy Issues: There are numerous outstanding policy disputes in Texas that are of considerable importance to the competitive process. There were no such ongoing disputes in New York.

Some of these issues are pending at the Texas PUC. Some of these issues have been decided by the PUC, but are being appealed. The application should have waited for final conclusion of these issues. If the FCC determines that these issues are important enough to affect the openness of the market in Texas, it should either deny the application, giving the specific reasons and policies that need to be adopted, or it should delay the application, pending conclusion of the litigation process.

While CFA takes no specific position on these issues, the following matters are clearly of substantial importance. These should be carefully examined by the Commission. The Commission should decide definitively whether they are barriers to competition and recommend changes if they are.

Several of the issues only require SBC to change its policies. These could be accomplished immediately. There are outstanding disputes about whether non-recurring and extended area service charges are discriminatory. Unlike other RBOCs, SBC continues to collect nonrecurring charges that competitors believe are "glue charges." SBC and the Texas PUC take the position that they are identifiable costs. SBC is collecting the charges, pending the outcome of legal challenges. Bell Atlantic had agreed to not collect similar charges subject to challenge.

SBC appears to be the only RBOC that requires competitors to secure intellectual property rights for network elements (and other services) that CLECs purchase from SBC. This position creates an obstacle to competition.

Other issues require SBC to make varying levels of changes to internal processes to implement new policies. These could take some time to modify. These include the use of a

three part order process for unbundled network elements, address accessing policy, and LIBD access policy. Each of these imposes obstacles to competitors that may be discriminatory.

The FCC should resolve these disputes. The 1996 put three referees on the field. It made the referee the final say. Congress could not have expected the three parties to agree on everything. The FCC has disagreed with the Department of Justice in the final disposition of the Bell Atlantic case. It has disagreed with state PUCs in the past. It can certainly disagree with the Texas PUC in this case. The important point is for the FCC to consider the outstanding policy issues and make clear what policies it will not accept and why.

CREATING A PROCESS FOR EXPEDITED COMPLIANCE PROCEEDINGS

The FCC's policy decision three years ago to evaluate applications on a take it or leave it basis with no modifications or updates made perfectly good sense when so many issues had to be addressed. However, over the course of three years the companies and state PUCs have gained a great deal of experience. With concerns narrowing and focusing on specific issues, it now makes sense to decide, definitely, all the issues that have been laid to rest and focus the attention of regulators, competitors and companies on the few outstanding problems. By writing an order in this proceeding that establishes this process for resolving issues, the application process will flow more smoothly.

In a complex industry such as telecommunications where companies that are competing must also cooperate because of the interconnected nature of the network, we believe it is only practical to narrow issues in this way and focus attention on key problems. The Commission correctly adopted its rule on no changes or amendments to the application after filing because the Regional Bell Operating Companies were filing clearly deficient applications with so many

unresolved issues that it was difficult, under the time frame in the statute to deal with "negotiations" about so many matters. SBC was a leader in creating the problem.

The industry and the process have matured past that point. Instead of simple all or nothing decisions, it is now time to institute a process that allows the parties to work actively on solutions at the federal level, just as they have on the state level. State and federal regulators conduct such discussions all the time. It is preferable to set them on a formal footing.

Such a compliance proceeding should be ordered only in the case where the Commission concludes that Sections 271 (c) (1) and 272 have been met. Compliance deals only with Section 271 (c) (2), but the Commission cannot find that entry is in the public interest until the market is irreversibly open. Therefore, the Public Interest Finding must await the final resolution of compliance issues. The Commission should, however, not embark upon a compliance proceeding unless it is convinced, but that in all other aspects, entry is in the public interest. To put the matter simply, the compliance proceeding says " fix these problems and entry will be granted." We believe that the Texas application has arrived at that point.

FOCUSED EFFORTS TO FINISH THE PROCESS

The compliance proceeding should deal with performance on parity problems and do so primarily by relying on the evaluation of statistical measures of performance. The compliance proceeding can also deal with policy matters that either have not been finalized by the state Commission or need to be addressed by SBC. In the case of the SBC application we believe that the Commission should deal with a number of policy issues that are outstanding in Texas.

Parties should not be allowed to revisit issues that have been closed by the FCC. All parties have had a full chance to express their views in this proceeding. Where the Commission

finds compliance, it should be done with the matter. Performance issues related to closed items should be dealt with under the Performance Assurance Plan or through FCC enforcement.

The compliance proceeding should be conducted on an expedited basis, because all issues have been so fully aired in the main proceeding and in the state proceedings. Commenters should be allowed one week with reply within a second week.

The Compliance proceeding can commence immediately upon the issuance of the FCC order in the main proceeding. The FCC need not wait the full 90 days to issue that order. In other words, after comments and replies have been taken in the main proceeding, the Commission could move quickly to take as many issues off the table as possible. It could then commence a compliance proceeding that deals intensively with the remaining issues. We think this would be a more effective way to resolve issues and serve the public interest much better than the all-or-nothing, take it or leave it process that has developed.

FCC PERFORMANCE PENALTIES TO ENSURE SUSTAINED PARITY

CFA has consistently recommended that the RBOCs be allowed to enter long distance when they have provided parity to competitors and demonstrated to regulators that they can and will sustain it. We have argued that if the conditions were put in place quickly and available for a significant period of time, competitors would have the confidence to make investments and decisions that would build a competitive base. CFA has stated that sustained parity for three months would be a convincing demonstration.

We remain convinced that sustained parity is necessary to demonstrate that markets are irreversibly open. We do not believe that the monetary penalties in the current Performance Assurance Plan are adequate to ensure against backsliding. Once parity has been demonstrated,

in order to assure that parity is sustained, we recommend that a layer of business interruption penalties be added atop the monetary penalties.

SBC would have to interrupt its long distance business if it repeatedly fails to maintain parity. The failure to provide parity interrupts the business of it local competitors. As long as SBC is in the long distance market, but not providing parity, it gains an advantage. If the problem persists, SBC should give up that advantage.

Therefore, if SBC fails to maintain parity for three months, it should cease advertising and marketing long distance service, including bundles of local and long distance service. If it fails for four consecutive months, it should stop advertising and marketing long distance service, including bundles of local and long distance service. If it fails to provide parity for six months in a row, it should stop taking any new order for long distance, until it demonstrates that it can provide parity for three consecutive months.

Because the business disruption penalties are severe, the Commission should identify with precision the indicators of performance on which it will rely for this purpose.

CONCLUSION

For the foregoing reasons, we recommend that the Commission identify all aspects of the SBC application for which it finds it to be in compliance with the 1996 Act. It should then hold the outstanding issues over for a compliance proceeding.

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